

SWIDLER
&
BERLIN
CHARTERED

ORIGINAL

July 13, 1998

VIA COURIER

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

RECEIVED
JUL 13 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for
Preemption of TN. Code Ann. Section 65-4-201(d) – CC Docket No. 98-92**

Dear Secretary Salas:

On behalf of KMC Telecom Inc. ("KMC"), enclosed for filing are an original and twelve (12) copies of KMC's Comments in the above-referenced docket. KMC has also submitted a copy of its Comments on diskette, formatted in Word Perfect 5.1, to Ms. Janice M. Myles.

Please date stamp the enclosed extra copy of this filing and return it in the self-addressed, postage prepaid envelope provided.

Should you have any questions concerning this filing, please do not hesitate to contact Kemal Hawa at (202) 945-6987.

Very truly yours,

Kemal M. Hawa

Richard M. Rindler
Kemal M. Hawa

Counsel for KMC Telecom Inc.

cc: Mr. Mike Duke
Ms. Janice M. Myles
ITS

No. of Copies rec'd 0+12
List ABCDE

244451.1

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
AVR, L.P. d/b/a)	
Hyperion of Tennessee, L.P.)	CC Docket No. 98-92
)	
Petition for Preemption of Tennessee Code)	
Annotated § 65-4-201(d) and Tennessee)	
Regulatory Authority Decision Denying)	
Hyperion's Application Requesting)	
Authority to Provide Service in Tennessee)	
Rural LEC Service Areas)	
)	

COMMENTS OF KMC TELECOM INC.

KMC Telecom Inc. ("KMC"), by its counsel, hereby submits these Comments in support of Hyperion of Tennessee, L.P.'s ("Hyperion") petition for preemption ("Preemption Petition") in the above-captioned docket. KMC strongly supports Hyperion's Preemption Petition, and urges this Commission to expeditiously grant the relief requested.

It is difficult to imagine a case more ripe for preemption. Section 65-4-201(d) of the Tennessee Code ("Section 65-4-201(d)") expressly prohibits competition in certain areas of Tennessee. In so doing, Section 65-4-201(d) directly contravenes the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"). There can be no dispute that Section 65-4-201(d) completely forecloses the benefits of competition to many Tennessee consumers. The only opposition to the Preemption Petition is likely to come from Tennessee incumbent LECs who retain their state enforced exclusivity, free from competition by new entrants.

I. Tennessee's Statute Protecting Incumbent LEC Monopolies is Preempted by Federal Law

Section 65-4-201(d) is a blanket prohibition on competition that stands in direct contrast to Section 253(a) of the 1996 Act, and should be preempted. Section 65-4-201(d) prohibits competition in all areas of Tennessee served by an incumbent LEC with fewer than 100,000 access lines in the state. The statute, on its face, categorically prohibits any entity from competing in areas served by entities that qualify for Tennessee's anti-competitive exemption. This statute quite simply cannot be reconciled with Section 253(a). Section 253(a) of the 1996 Act prohibits any state or local government from enacting any statute or regulation that "may prohibit or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Where state law stands in direct conflict with federal law, the state law must yield.¹ If any statute or regulation contravenes Section 253(a), then Section 253(d) mandates that this Commission preempt such statute or regulation. As noted in the Preemption Petition, this Commission has twice considered statutes that are virtually identical to Section 65-4-201(d), and has preempted both. In *Silver Star*² and the *Texas Preemption Petition*,³ this Commission made clear

¹ Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986).

² *In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, FCC 97-336, CCB Pol 97-1, ¶ 42 (Sep. 24, 1996) ("Silver Star").

³ *In the Matter of the Public Utility Commission of Texas*, CCBPol 96-13, *The Competition Policy Institute, IntelCom Group (USA), Inc., and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc.*, CCBPol 96-14, *Teleport Communications Group, Inc.*, CCBPol 96-16, *City of Abilene, Texas*, CCBPol 96-19, *Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order (rel. Oct. 1, 1997).

that Section 253(a), at the very least, proscribes state and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular state or locality. Notably, the statutes at issue in *Silver Star* and the *Texas Preemption Petition* prohibited competition even more narrowly than Section 65-4-201(d) in Tennessee, prohibiting competition in areas served by incumbent LECs with fewer than 30,000 and 31,000 access lines respectively. As indicated previously, Section 65-4-201(d) prohibits competition in areas served by incumbent LECs with fewer than 100,000 access lines within the state, thus protecting large entities such as Tennessee Telephone Company from competition. Tennessee Telephone Company has approximately 90,000 access lines in Tennessee, and is a subsidiary of TDS Telecom, which operates 105 telephone companies nationwide, serving almost half a million access lines.

CLECs such as KMC, as new entrants into the local exchange telecommunications marketplace, must overcome substantial obstacles to compete viably against incumbent LECs. Incumbent LECs enjoy the benefits of their historical monopolies, which include a captive customer base, guaranteed rates of return, and control of a ubiquitous telecommunications network that has been fully financed by the public. The Tennessee Regulatory Authority ("TRA") has enforced a statute which burdens CLECs with the ultimate competitive disadvantage, an absolute barrier to competitive entry.

II. Section 65-4-201(d) Meets No Exception Under Section 253(b) of the 1996 Act

In denying Hyperion's application to provide service in areas of Tennessee served by entities with fewer than 100,000 access lines, the TRA violated Section 253(b). Section 253(b) establishes a limited exception to the general provisions of Section 253(a), where state regulations are competitively neutral, necessary to preserve and advance universal service, and protect the public

interest. In interpreting this provision, the FCC has consistently noted that no statute or regulation that prohibits all but a single entity from providing service in a given service area can ever be competitively neutral. According to the Commission, such protectionist provisions award "incumbent LECs the ultimate competitive advantage – preservation of monopoly status – and saddles potential new entrants with the ultimate competitive disadvantage – an insurmountable barrier to entry." The TRA distorted the plain language of Section 253(b), interpreting the provision in a manner that is completely opposite of its purpose. The TRA held that Section 65-4-201(d) is competitively neutral since it excludes all carriers, without exception, from competing with the incumbent LEC. Logic and common sense mandate a different conclusion. As Hyperion stated in the Preemption Petition, no legitimate reading of the phrase "competitively neutral" could lead one to conclude that a statute that prohibits any carrier from competing with the incumbent LEC is competitively neutral. The TRA has seemingly confused the terms "competitively neutral" and "monopoly."

The TRA's alleged universal service concerns are a red herring. This Commission has already adopted rules that are designed to preserve and advance universal service, and various states, including Tennessee, are currently conducting their own investigations into the proper level of assessments to ensure that universal service is maintained. This Commission has made clear that in preserving universal service, Congress envisioned that "[s]tates and localities would enforce the public interest goals delineated in Section 253(b) through means other than absolute prohibitions on entry, such as clearly defined service quality requirements or legitimate enforcement actions."⁴

⁴ *In the Matter of Classic Telephone Company, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, CCB Pol 96-10, FCC

Prohibiting competition and denying consumers choice does not benefit universal service nor any other public interest concern.

III. The Commission Should Clarify That Protectionist Statutes Such as Section 65-4-201(d) Cannot Stand in View of Federal Law

This proceeding presents the Commission with the question, for at least the fourth time, of whether statutes, regulations, or ordinances that completely prohibit competition in certain areas are permissible under federal law. Numerous states have statutes, regulations, or policies that are similar to Section 65-4-201(d), and CLECs such as Hyperion and KMC should not have to separately challenge each such statute or regulation in the future. CLECs wishing to bring the benefits of competition to consumers in protected areas have either been stifled in their efforts, or have incurred substantial delay and expense in challenging the statute or regulation. This Commission should clarify in this proceeding that, as a general matter, any statute, regulation or policy that has the effect of prohibiting all but a single entity from competing in a given area is preempted under federal law. In addition, as stated in the Preemption Petition, this Commission should clarify that Section 251(f) of the 1996 Act (the so-called "rural LEC exemption") was designed only to provide small or rural incumbent LECs with certain relief from the heightened requirements of Section 251(c). Section 251(f) in no way provides any incumbent LEC with protection against competition. KMC requests that this Commission establish a clear precedent that can be used in other states to ensure that CLECs can avoid the unnecessary time and expense of future preemptory challenges.

The Preemption Petition also gives this Commission a chance to demonstrate that the 1996 Act supercedes earlier inconsistent state legislation. Hyperion properly noted that Section 65-4-

96-397 at ¶ 25 (rel. Oct. 1, 1996).

201(d) was enacted prior to the 1996 Act, at a time when local exchange telecommunications competition in all markets was not mandated under federal law. At the time Section 65-4-201 was enacted, the Tennessee legislature was in many ways actually acting pro-competitively, authorizing local exchange competition in the service areas of BellSouth and United Telephone Company, but excluding competition in all other areas of Tennessee. As stated in the Preemption Petition, however, the 1996 Act went substantially further, requiring that local exchange telecommunications competition be promoted in all states and in all markets. This Commission should use this proceeding as an opportunity to give states additional guidance on such antiquated statutes, clarifying that such statutes will not withstand a federal challenge, and should not be enforced.

Conclusion

The 1996 Act was enacted to ensure that all consumers can enjoy the benefits of local exchange telecommunications competition, including new and innovative service offerings, lower prices, and better quality services. Many states, such as Tennessee, either have residual anti-competitive statutes that were enacted prior to the 1996 Act, or have subsequently adopted protectionist policies contrary to the language and purpose of the 1996 Act. Section 253(d) makes it clear that this Commission has the authority to and should preempt any state or local statute or regulation that prohibits or has the effect of prohibiting any entity from providing any telecommunications service. For this reason, KMC Telecom Inc. supports Hyperion's Preemption Petition, and submits that Section 65-4-201(d) of the Tennessee Code should hereby be preempted.

Respectfully submitted,



Richard M. Rindler
Kemal M. Hawa
SWIDLER & BERLIN, CHTD.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
(202) 424-7500 (Phone)
(202) 424-7645 (Fax)

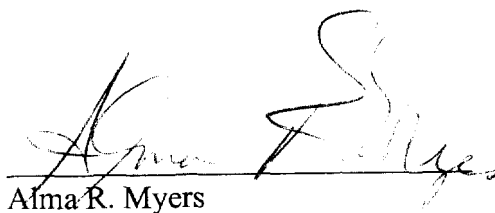
Counsel for KMC Telecom Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 1998, a true copy of the foregoing document was served by hand on the parties listed below.

Janice M. Myles (pleading and disk)
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036


Alma R. Myers